



CITIZENS OF DIXON, NEW MEXICO, ET AL.

186 IBLA 350

Decided December 9, 2015



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Interior Board of Land Appeals
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IBLA 2014-59 & 60

Decided December 9, 2015

Appeal from an October 30, 2013, decision by the Field Manager, Taos Field Office, Bureau of Land Management (BLM), approving a communication use lease and access road right-of-way to Commnet Four Corners, LLC, for installation and maintenance of a 60-foot monopole communications tower on BLM-managed lands between Embudo and Dixon, New Mexico. NMNM 129416.

Affirmed.

1. National Environmental Policy Act of 1969:
Generally--National Environmental Policy Act of 1969:
Environmental Assessments

We will uphold a BLM decision to proceed with a proposed action based on an environmental assessment when the record demonstrates that BLM has taken a “hard look” at the potential environmental consequences of the proposed action, and made a convincing case that no significant impact will result or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. An appellant has the burden of demonstrating, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action.

2. National Environmental Policy Act of 1969:
Generally--National Environmental Policy Act of 1969:
Environmental Assessments

In analyzing the impacts of a proposed action and in reaching a conclusion about the significance of those impacts, agencies may rely on the technical expertise of agency or outside experts. In challenging such reliance, an appellant must show, by a preponderance of the

evidence, error in the expert's methodology, data, and/or analysis.

APPEARANCES: Citizens of Dixon, Dixon, New Mexico, *pro se*; Doris Finney, Dixon, New Mexico, *pro se*; Frank Lupo, Esq., Southwest Regional Office of the Solicitor, U.S. Department of the Interior, Albuquerque, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE SOSIN

The Citizens of Dixon, New Mexico, and Doris Finney (appellants) have appealed an October 30, 2013, decision issued by the Field Manager, Taos Field Office, BLM, approving a communication use lease and access road right-of-way, serialized as NMNM 129416, to Commnet Four Corners, LLC (Commnet), for installation and maintenance of a 60-foot monopole communications tower on BLM-managed lands in Rio Arriba County, between Embudo and Dixon, New Mexico. BLM's decision was supported by an Environmental Assessment (EA), DOI-BLM-NM-F020-2013-0030-EA, and a Finding of No Significant Impact (FONSI).

Appellants raise a single issue in their appeals: Whether BLM properly analyzed the potential public health impacts of the radio frequency (RF) emissions from the communications tower, due to the tower's proximity to the town of Dixon, prior to issuing its decision. For the reasons set forth below, we find appellants have not demonstrated any error in BLM's decision. We therefore affirm.

Background

On September 27, 2012, Commnet filed an application for a right-of-way communications site lease to construct a wireless communication facility to extend cellular communications coverage to rural areas in and around the town of Dixon, New Mexico that lack service. The project would consist of a 60-foot self-supporting monopole communications tower and associated facilities, requiring disturbance of a 15 ft. x 15 ft. area situated on public lands. BLM initiated public scoping for the proposed project on May 1, 2013, by posting on the agency's website and publishing in a local e-mail newsletter, the Dixon Town Crier, a letter describing the project and its location, and seeking public input through May 31, 2013. Administrative Record (AR) 000046-000048 (Scoping letter); AR 000153 (Decision Record at unpaginated (unp.) 2); AR 000158 (EA at 2).¹ BLM received twenty-three comment letters during the scoping period; a number of these comments identified concerns about the human

¹ The AR has been bates stamped, and we cite to these numbers, as appropriate.

health risks associated with the proposed project. AR 000049-000081 (public scoping comments).

After scoping concluded, BLM prepared a draft EA in compliance with the regulations implementing the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h (2012). See 40 C.F.R. Parts 1500-1508 and 43 C.F.R. Part 46. BLM provided a 30-day public comment period on the draft EA. AR 000042 (Letter to interested public). BLM received three comments, one of which discussed the commenter's concerns about the public health impacts of the proposed tower. AR 000043-000045. BLM then prepared its final EA and FONSI. AR 000154-000228 (EA); AR 000150-000151 (FONSI).

On October 28, 2013, the Field Manager for BLM's Taos Field Office signed the Decision Record approving the project. AR 000152-000153 (Decision Record). After Commnet signed the right-of-way and communications use lease, and paid the first year's rental, BLM approved both instruments in a decision dated October 30, 2013. AR 000016-000017 (Decision).

A group of individuals, identifying themselves as "Citizens of Dixon, New Mexico," and Doris Finney each filed a notice of appeal (NOA), dated November 25, 2013. Neither Citizens of Dixon nor Doris Finney filed a separate statement of reasons.² By Order dated January 10, 2014, this Board consolidated the appeals. On February 24, 2014, BLM filed its Answer.

Analysis

In their appeals, appellants express great concern about the potential effects that RF emissions from the cellular tower will have on public health, and urge BLM to relocate the tower. In her appeal, Doris Finney states that she is "very concerned about radiation emitted from the proposed tower," and that "[a]n alternative would be to locate the tower at another location but I feel it is violating our rights to be exposed to this radiation when it is not absolutely necessary." AR 000014, AR 000015 (Finney NOA at unp. 1, 2). The Citizens of Dixon similarly state: "We are concerned over the

² The regulations, at 43 C.F.R. § 4.412(a), require an appellant to file a Statement of Reasons (SOR) within 30 days of filing an NOA. Failure to do so can result in summary dismissal of an appeal. See 43 C.F.R. § 4.402. However, we will not exercise our discretion to dismiss appellants' appeals on that basis because appellants' NOAs each served as an adequate SOR; moreover, BLM filed an answer, eliminating any concern that BLM is prejudiced by the lack of SORs. See *Tekxon Onshore Oil and Gas, LLC*, 184 IBLA 134, 139 n.11 (2013).

severe long term health effects radiation exposure may cause to our community – especially to our children, as they are most vulnerable.” AR 00002 (Citizens NOA at unp. 2). They ask BLM and Commnet to “relocate the cell tower to a location at least five miles from our homes.” AR 00004 (Citizens NOA at unp. 4).

Appellants do not specifically allege that BLM violated any law in approving Commnet’s cellular tower. In its Answer, BLM characterizes appellants’ challenges as allegations that BLM violated NEPA by failing in the EA to adequately consider the public health and safety impacts of the proposed cellular tower. See Answer at 2. We agree and will construe appellants’ arguments as challenges brought under NEPA.

It is well established that NEPA requires an agency to make an informed decision, but it does not require any particular result. See, e.g., *Bear River Development Corporation*, 157 IBLA 37, 49 (2002) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.”); *National Wildlife Federation*, 150 IBLA 385, 396 (1999); *Wyoming Audubon*, 151 IBLA 42, 51 (1999); *Missouri Coalition for the Environment*, 124 IBLA 211, 223 (1992).

[1] To comply with NEPA, an EA must consider the impacts of a proposed action and alternatives to that action. See 40 C.F.R. § 1508.9(b) (an EA “shall include [a] brief discussion[] . . . of alternatives”); 43 C.F.R. § 46.310(a)(4) (an EA “must include brief discussions of . . . [t]he environmental impacts of the alternatives considered”); see also *Birch Creek Ranch*, 184 IBLA 307, 323 (2014). We will uphold a BLM decision to proceed with a proposed action based on an EA when the record demonstrates that BLM has taken a “hard look” at the potential environmental consequences of the proposed action, and made a convincing case that no significant impact will result or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. *Birch Creek Ranch, LLC*, 184 IBLA at 317; *Nora L. Hamilton*, 179 IBLA 132, 142 (2010). In assessing the adequacy of an EA, we are guided by a “rule of reason,” such that the EA need only briefly discuss the likely impacts of the proposed action. *Southern Utah Wilderness Alliance*, 185 IBLA 150, 156 (2014); *Shasta Coalition for the Preservation of Land*, 172 IBLA 333, 343 (2007). As we have stated: “By nature, [an EA] is intended to be an overview of environmental concerns, not an exhaustive study of all environmental issues which the project raises.” *Southern Utah Wilderness Alliance*, 185 IBLA at 156 (quoting *Bales Ranch, Inc.*, 151 IBLA 353, 358 (2000) (quoting *Don’t Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1247 (M.D. Pa. 1992)).

An appellant seeking to overcome a decision based on an EA therefore carries the burden of demonstrating, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action.

Birch Creek Ranch, 184 IBLA at 317 (citing *Bales Ranch, Inc.*, 151 IBLA at 357). In meeting this burden, an appellant cannot simply allege errors or merely identify points of disagreement. *Southern Utah Wilderness Alliance*, 182 IBLA 377, 396 (2012). As we have explained: “A simple disagreement with the outcome, BLM’s analysis, or its decision choice is not proof of a NEPA violation.” *Wyoming Wildlife Federation*, 184 IBLA 352, 358-59 (2013); see also *Powder River Basin Resource Council*, 180 IBLA 1, 13 (2010) (“The fact that the appellant has a differing opinion about likely environmental impacts or prefers that BLM take another course of action does not show that BLM violated the procedural requirements of NEPA.”).

[2] In analyzing the impacts of a proposed action and in reaching an informed conclusion about the significance of those impacts, agencies may rely on the technical expertise of agency or outside experts. See *Salinas Ramblers Motorcycle Club*, 171 IBLA 396, 400 (2007). In challenging such reliance, an appellant must show, by a preponderance of the evidence, “error in the methodology, data and/or analysis.” *Id.*; see also *Powder River Basin Resource Council*, 180 IBLA at 13. As stated above, an appellant’s different opinion is not enough to meet this burden. *Salinas Ramblers Motorcycle Club*, 171 IBLA at 400.

For example, in *Salinas Ramblers Motorcycle Club*, the Board upheld a BLM decision to close an Area of Critical Environmental Concern (ACEC) because of the health risks from high concentrations of naturally occurring asbestos in the soil. BLM relied on a technical memorandum from the Environmental Protection Agency (EPA) in which that agency recommended that BLM close the area during certain parts of the year, based on an analysis of air samples taken in the ACEC indicating motorcycle riders were being exposed to elevated levels of asbestos fibers. See 171 IBLA at 398. Appellants in that case disputed EPA’s conclusion based on their own expert’s opinion. In upholding BLM’s decision, we stated that our precedent “clearly support[ed]” BLM’s reliance on the expert views of EPA, an agency whose mission relates directly and substantially to public health and safety. *Id.* at 401. We concluded that, while the appellants “plainly espouse a different viewpoint . . . , they have not shown that the decision to temporarily close the ACEC . . . is irrational or unsupported by the record before us.” *Id.* at 402.

Here, BLM’s authorization of Commnet’s cellular tower requires Commnet to comply with the Federal Communications Commission (FCC) guidelines on RF emissions. Because the FCC is the agency charged with regulating radio, television, satellite, and cable communications within the United States, it is reasonable for BLM to rely on the FCC’s guidelines for RF emissions in its authorization of Commnet’s cellular tower. See Answer at 10 (“[T]he BLM determined that the Federal Communication Commission’s (FCC’s) regulation of RF hazards sufficiently protected

against human exposure.”). In describing the FCC’s responsibilities for regulating RF emissions, the EA states:

The FCC is required by the National Environmental Policy Act of 1969, among other things, to evaluate the effect of emissions from FCC-regulated transmitters on the quality of the human environment. Several organizations, such as the American National Standards Institute (ANSI), the Institute of Electrical and Electronics Engineers (IEEE), and the National Council on Radiation Protection and Measurements (NCRP) have issued recommendations for human exposure to RF electromagnetic fields. On August 1, 1996, the FCC adopted the NCRP’s recommended Maximum Permissible Exposure limits for field strength and power density for the transmitters operating at frequencies of 300 kHz to 100 GHz. In addition, the Commission adopted the specific absorption rate (SAR) limits for devices operating within close proximity to the body as specified within the ANSI/IEEE C95.1-1992 guidelines.

AR 000170 (EA at 14). BLM explains in the EA that as part of Commnet’s compliance with FCC regulations and guidelines, the company performed an RF emissions study that showed that the proposed tower site would emit RF levels significantly below the maximum RF levels set by the FCC. AR 000170 (EA at 14); *see also* Answer (Ex. B, Summary Sheet of Embudo NM RF Study). BLM therefore concluded that because “[t]he proposed communications tower would adhere to all FCC rules, guidelines, and regulations with regard to RF emissions[,] . . . no impacts to public health and safety from radiation are expected.” AR 000178 (EA at 22).³

Appellants disagree with BLM’s decision to authorize the construction of Commnet’s cellular tower, but do not provide any evidence to show error in BLM’s reliance on the FCC guidelines or the agency’s decision. The Citizens of Dixon state

³ Commnet’s communications site lease specifically includes a “Special Stipulation” that the company’s authorization is “conditioned upon the submission to the authorized officer a copy of an approved license and/or renewal license granted by the Federal Communications Commission (FCC) or Interdepartmental Radio Advisory Committee (IRAC) for each electronic station installation authorized by this grant or future amendment to this grant. . . . Failure to submit the FCC or IRAC authorization copy . . . shall be grounds for termination of this grant or cancellation of amendment to this grant.” AR 000025 and 000028. The lease also specifies compliance with the “Motorola R56 Standards . . . and/or other applicable recognized industry standards.” AR 000026 and 000030.

that they “are not convinced that the FCC is acting in the best interest of our health. Many scientists, doctors, and researchers from around the world have discovered that ‘allowable’ levels of radio frequency exposure may be too high” and that the “highest allowable rate” in other countries “is less than half of the lower end of what is allowable in the United States.” AR 00002, 00003 (Citizens NOA at unp. 2, 3). Although Citizens for Dixon express doubt about the FCC guidelines, other than noting the different allowable levels of other countries, they do not provide any information or analysis that shows error in the FCC’s methodology, data or analysis, or that shows that BLM failed to consider the impacts of RF emissions in its NEPA analysis. As BLM notes in its Answer, appellants appear to be “attempting a collateral attack on the sufficiency of the FCC’s regulation of RF emissions risk.” Answer at 12. In her appeal, Doris Finney does not address the FCC guidelines; rather, she simply states that Commnet’s tower “will increase electromagnetic radiation,” adding to existing background radiation levels. AR 000014 (Finney NOA at unp. 1). At bottom, however, appellants merely disagree with BLM’s decision. See Answer at 11 (“Appellants’ concerns merely indicate a difference in opinion that has already been assessed by the BLM.”). This is not enough.

BLM’s EA demonstrates that the agency considered the issue of RF emissions in its decisionmaking process. In the EA, BLM recognizes the public health and safety concerns associated with RF emissions from cellular towers. For example, BLM acknowledges that during public scoping, some commenters asked that the tower be located at least 5 miles from the town of Dixon. AR 000159, 000165 (EA at 3, 9). BLM states, however, that “a location 5 miles away would not provide the coverage in the area needing better service and would therefore not meet the stated purpose and need of the project.” AR 000165 (EA at 9). The EA further provides that adherence to all FCC “rules, guidelines, and requirements regarding radio-frequency transmissions and emissions” would be a required stipulation or condition of approval of Commnet’s authorization, and that Commnet’s RF emissions study showed that the tower “would emit RF levels significantly below the maximum RF levels set by the FCC,” and that “[t]he site would be managed to maintain the RF frequency below the public standard as defined by the FCC.” AR 000163, 000170 (EA at 7, 14).

We agree with BLM that appellants “have not provided any underlying data or study to support their disagreements with the BLM’s conclusion.” Answer at 11 (citing *Powder River Basin Resource Council*, 180 IBLA at 13). They have therefore failed to satisfy their burden of showing that BLM did not consider a substantial environmental question of material significance, or that BLM erred in relying on Commnet’s compliance with FCC regulations and guidelines.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____/s/
Amy B. Sosin
Administrative Judge

I concur:

_____/s/
Christina S. Kalavritinos
Administrative Judge